# International Commercial Transactions, Franchising, and Distribution

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## I. EC Vertical Restraints Block Exemption Regulation and Guidelines on Vertical Restraints

On June 1, 2010, new European Union ("EU") competition rules on supply and distribution agreements entered into force. The rules apply to all business sectors except motor vehicles. This section provides a summary of the new EU competition rules and also briefly compares the application of U.S. antitrust law to restrictions in vertical agreements.

The new EU legal framework consists of the new European Commission ("EC") Vertical Restraints Block Exemption Regulation ("VBER")[1] and related Guidelines on Vertical Restraints ("EC Guidelines").[2] The new rules use the term "vertical" to refer to supply and distribution agreements entered into between companies operating at different levels of the production chain, such as agreements between manufacturers and wholesalers or retailers.[3] The EC is concerned only with those types of vertical "restraints" or restrictions on competition that arise when there is some degree of market power, either at the level of the supplier, the buyer, or both.[4]

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1. European Commission Regulation 330/10, On the application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) (EU) [hereinafter VBER].

2. European Commission Guidelines on Vertical Restraints, 2010 O.J. (C130) [hereinafter EC Guidelines].

3. *See* EC Memorandum, Memo 10/138, Antitrust: Commission adopts revised competition rules for vertical agreements: frequently asked questions 1 (Apr. 20, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/138&format=PDF&aged=0&language=EN&guiLanguage=en.

4. *See, e.g.*, EC Guidelines, ¶¶ 6, 23.

The VBER "block exempts," or provides a safe harbor for, supply and distribution agreements concluded between companies that have limited market power, defined as a market share of both the supplier and buyer not exceeding thirty percent of their relevant market.[5] To qualify for the safe harbor, agreements must contain no "hardcore restrictions."[6]

Agreements qualifying for this "block exemption" receive a positive presumption that the agreements will not have anticompetitive effects and are exempted from the prohibition against anticompetitive agreements set out in Article 101(1) of the EU Treaty.[7] For vertical agreements concluded by companies whose market share exceeds thirty percent, there is no exemption and no presumption that the agreement is either legal or illegal.[8] It will be necessary to assess the agreement's positive and negative effects on the market based on the EC Guidelines accompanying the VBER.[9]

The VBER lists a series of specific arrangements, labeled as "hardcore restrictions," that are considered so serious that their inclusion in an agreement will preclude that agreement from benefiting from the safe harbor exemption, regardless of the parties' market shares.[10] Hardcore restrictions include restraints on the buyer's ability to determine its sale price, commonly referred to as resale price maintenance ("RPM"), or certain types of resale restrictions, which may create barriers to the EU's internal market.[11] Manufacturers can, however, encourage an exclusive distributor to invest in an exclusively allocated territory or customer group by protecting them from active sales by other distributors.[12] The manufacturer cannot restrict its distributor from responding to customers' direct demands, known as "passive sales."[13] The VBER also allows manufacturers to choose their distributors on the basis of specified criteria and to prohibit sales to unauthorized distributors, known as a "selective distribution" system.[14] Selected distributors must retain the ability to sell to other authorized distributors and to any end consumer.[15] Any other restriction of their freedom regarding where and to whom they may sell would be a hardcore restriction.

The new EC Guidelines contain a detailed discussion of Internet sales. Some of the most controversial issues that arose under the previous rules concerned the extent to which suppliers could limit the Internet sales activities of their distributors. The new guidelines attempt to strike a balance between allowing consumers to take advantage of cross-border purchasing and protecting against those distributors that "free-ride" on the promotional and marketing investments of other distributors.[16] The following restrictions on passive selling included in the EC Guidelines are considered hardcore restrictions on Internet sales: an absolute prohibition on Internet sales, requiring distributors to re-

5. *See* VBER, arts. 3-4.
6. *Id.* art. 4. *See infra* notes 10-15 and accompanying text.
7. *See, e.g.*, VBER, art. 2(1).
8. *See, e.g.*, EC Guidelines, ¶ 96.
9. *Id.* ¶ 97.
10. *See* VBER, art. 4.
11. *Id.*
12. *See* VBER, art. 4(b)(i).
13. *See* EC Guidelines, ¶ 51.
14. *Id.* ¶¶ 174-88.
15. *See* VBER, art. 4(c) & (d); EC Guidelines, ¶ 174.
16. *See* EC Guidelines, ¶¶ 52-54.

strict access to their website for customers outside their territory or refuse payments by credit cards not issued in their country, limiting the proportion of a distributor's sales over the Internet, and requiring Internet product prices to be higher than offline sales.[17]

Suppliers have the ability to protect an exclusive distribution system by restricting active sales and regulating online sales to maintain the quality of the distribution network and to prevent free-riding. Consequently, suppliers can prevent distributors from selling only on the Internet and refusing to supply pure online players, impose quality and service conditions which must be equivalent to conditions applicable to offline sales, require a certain absolute amount of products be sold through retail store and fixed-fee to support distributor's online or offline efforts, and condition the use of third party platforms only in accordance with agreed standards.[18]

The presumption remains in the EC Guidelines that the inclusion of hardcore restrictions will be anticompetitive, violating Article 101(1) and therefore unlikely to benefit from the exemption provided in Article 101(3).[19] But the new EC Guidelines allow greater room for argument that the Article 101(3) exemption may apply even to hardcore restrictions if it can be shown that they generate efficiencies.

The clearest example of this exemption is the new text setting out the three circumstances in which fixed or minimum RPM may be exempted, a possibility not even contemplated under the prior rules.[20] The EC Guidelines state that minimum RPM may be necessary to induce distributors to invest efforts in introducing a new product or brand; to coordinate a short term (six to eight weeks), low price campaign; or to encourage distributors to provide additional pre-sales services.[21] It will be for the parties to the agreement to prove that the criteria for the exemption are met.[22] The EC and many national competition authorities ("NCAs") and courts are expected to remain cautious in attributing economic benefits to resale price maintenance, but those NCAs and courts that favor a more generous approach may be emboldened by the new EC Guidelines.

The EC Guidelines also contain new provisions on how the EC will assess agreements for "up front access payments" ("UAPs")[23] and "category management" agreements.[24] The EC Guidelines define UAPs as fixed fees that suppliers pay to distributors for services such as the provision of shelf space for the supplier's product or access to the distributor's promotional campaign and, in principle, are exempted by the VBER.[25] Even where UAPs are not block exempted, the EC recognizes that such arrangements can contribute to more efficient allocation of shelf space for new products and can prevent suppliers from free-riding on distributors' promotional efforts.[26] On the other hand, the EC recognizes that their widespread use by retailers can increase barriers to entry for small entrants and can potentially result in an anticompetitive exclusion from the market or collusion be-

17. *Id.* ¶ 52.
18. *Id.* ¶¶ 53-54.
19. *Id.* ¶ 47.
20. *Id.* ¶¶ 223-29.
21. *Id.* ¶ 225.
22. *Id.*
23. *Id.* ¶¶ 203-08.
24. *Id.* ¶¶ 209-13.
25. *Id.* ¶ 203.
26. *Id.* ¶¶ 207-08.

tween distributors.[27] Category management agreements allow a distributor to appoint a leading supplier in charge of its marketing of a particular product category and may be exempted by the VBER.[28] When the exemption does not apply, the possible benefits–in terms of access to marketing expertise and economies of scale–will need to be balanced against the risks of anticompetitive exclusion of other suppliers and possible collusion between suppliers and distributors.[29]

U.S. antitrust law contains no direct analogue to the VBER, but it does make a distinction between vertical and horizontal agreements that can affect the standard applicable in determining the lawfulness of the arrangement. Historically, U.S. antitrust law has distinguished between vertical non-price agreements (such as customer or territorial restrictions) and vertical price agreements (such as the imposition of a minimum or maximum resale price).[30] Vertical non-price agreements are evaluated under a rule of reason, which requires a balancing of pro-competitive benefits versus anticompetitive effects. The U.S. Supreme Court has held that non-price restraints have "real potential to stimulate interbrand competition."[31] Robust interbrand competition, according to the Court, provides a significant check on any increase in intrabrand market power resulting from the implementation of vertical non-price restraints.[32] In declining to apply a *per se* rule of illegality and adopting instead a rule of reason analysis, the Court held that the adverse competitive effect of vertical non-price restraints on intrabrand competition generally is outweighed by the "market-freeing" benefits that such restraints can provide to interbrand competition.[33] To establish a violation in such cases, plaintiffs will generally be required to demonstrate that the defendant possesses market power in a properly defined relevant market and that the challenged practice harms competition in that market (*e.g.*, resulting in higher prices or reduced output).

Vertical price-related restrictions were also generally evaluated under a rule of reason analysis with one exemption: minimum resale price maintenance. But in a 2007 case, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[34] the U.S. Supreme Court overruled its ninety-six year-old precedent requiring application of the *per se* rule to vertical minimum resale price maintenance agreements, and held instead that such agreements should be assessed under the rule of reason. Under *Leegin*, a court will focus on the net pro-competitive or anti-competitive effect of resale price maintenance. The Court held that resale price maintenance can be pro-competitive because it may stimulate interbrand competition by (1) reducing intrabrand price competition and thereby increasing non-price competition among the manufacturer's retailers; (2) encouraging retailers to increase tangible or intangible services or promotional efforts to support a brand; (3) discouraging discount retailers from free-riding on retailers that furnish services; and (4) facilitating market entry for new firms or brands.[35] The Court nevertheless held that resale price maintenance can

27. *Id.* ¶¶ 204-06.
28. *Id.* ¶ 209.
29. *Id.* ¶¶ 209-13.
30. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
31. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724 (1988) (citing *Continental T.V., Inc.*, 433 U.S. at 52 n.19).
32. *See, e.g.*, *Business Elecs. Corp.*, 485 U.S at 725.
33. *Id.* at 726.
34. Leegin Creative Leather Prod., Inc. v. PSKS, Inc, 551 U.S. 877 (2007).
35. *Id.* at 890-91.

be anticompetitive if it facilitates a manufacturer or retailer cartel or is used by a powerful manufacturer to "give retailers an incentive not to sell the products of smaller rivals or new entrants" or a powerful retailer to "forestall innovation in distribution that decreases costs."[36] The Court provided some guidance for analyzing resale maintenance agreements under the rule of reason, stating that "certain factors are relevant to the inquiry," including the number of manufacturers engaged in that practice in the market, whether the restraint is at the request of the retailers or manufacturer, and whether the manufacturer or retailers driving the practice possess market power.[37]

Whether applying EU competition law or U.S. antitrust law, the analysis of restrictions in vertical agreements requires a knowledgeable and independent assessment that takes into account the facts and circumstances of the restrictions' likely competitive effect. As the EC Guidelines acknowledge, "[f]or most vertical restraints competition concerns only arise if there is insufficient competition at one or more levels of trade, that is, there is some degree of market power at the level of the supplier or the buyer or at both levels."[38] As a practical matter, the analysis of distribution agreements under EU competition law and U.S. antitrust law may result in similar outcomes. There remain some important differences, in particular, when a distribution agreement may threaten the integration of the single market–one of the fundamental bases of the EU.

## II. Standard Terms in Contracts for the Sale of Goods

### A. Incoterms® 2010

Incoterms are rules published by the International Chamber of Commerce ("ICC"), that are commonly used in international trade and that provide standard definitions of the rights and obligations of the parties in contracts for the sale of goods. Although courts and other governmental authorities may choose to rely on Incoterms definitions in construing contract terms even where the parties have not expressly referred to Incoterms definitions in their contract,[39] it is good practice for the parties to expressly incorporate Incoterms definitions by reference when desired. The ICC published the first version of Incoterms in 1936, with subsequent revisions published in 1953, 1967, 1976, 1980, 1990, 2000, and 2010.

From their inception, Incoterms were intended to be a guide for international trade and practice. To keep pace with the development of international trade and technology, the ICC has updated the Incoterm rules on a regular basis. Practitioners in global trade use Incoterms for guidance in their transactions, in order to reduce transaction costs and the risk of legal complications.

The 2010 edition of Incoterms is the eighth edition of Incoterms promulgated by the ICC.[40] Effective on January 1, 2011, Incoterms 2010 revises core provisions in the 2000

36. *Id.* at 893-94.

37. *Id.* at 897-98.

38. *See* EC Guidelines, ¶ 6.

39. *See, e.g.*, S.K.I. Beer Corp. v. Baltika Brewery, 612 F.3d 705, 707 n.2 (2d Cir. 2010).

40. Int'l Chamber of Commerce, Incoterms 2010: ICC Official Rules for the Interpretation of Trade Terms (2010) (hereinafter "Incoterms 2010").

edition of Incoterms. The new edition includes the following key changes from prior editions:

1. *Expansion of Rules to Cover Domestic Trade*

Reflecting the increased use of standard terms in both domestic and international commerce, Incoterms 2010 formally recognize Incoterms as applicable in both domestic and international transactions. This recognition was accomplished in Incoterms 2010 by adding language to several of the rules to the effect that export and import formalities will only need to be complied with where applicable. Previous Incoterms editions specifically stated that they were to be used only in global trade and did not mention domestic application. Therefore, before Incoterms 2010 became effective, parties in each country typically used their own trade terms in domestic contracts for the sale of goods.

2. *Separation of Rules Applicable to Maritime Transport from Rules Applicable to "Any Mode" of Transport*

In an effort to classify and simplify Incoterms, the ICC assigned the eleven Incoterms into two distinct classifications: "rules for any mode or modes of transportation" and "rules for sea and inland waterway transport."[41] Under the former classification, Incoterms Ex Works ("EXW"), Free Carrier ("FCA"), Carriage Paid to ("CPT"), Carriage and Insurance Paid to ("CIP"), Delivered at Terminal ("DAT"), Delivered at Place ("DAP"), and Delivered Duty Paid ("DDP") may be used "irrespective of the mode of transport selected and irrespective of whether one or more than one mode of transport is employed."[42] Specifically, they can be used where no maritime transport is used or where a ship is used for part of the carriage.[43] Under the latter classification, Incoterms Free Alongside Ship ("FAS"), Free On Board ("FOB"), Cost and Freight ("CFR") and Cost, Insurance and Freight ("CIF") can be used where the point of delivery and the place where the goods are carried to are both ports. Thus, the Incoterms FAS, FOB, CFR, and CIF now belong only in the maritime rules. In the definitions of FOB, CFR, and CIF, the phrase "ship's rail" has been deleted and the reference now is to delivery of goods "on board." FAS and FOB do not apply to multimodal sea transport in containers.[44]

3. *Replacement of Incoterms; New Incoterms*

Incoterms 2010 reduces the total number of Incoterms from thirteen to eleven by eliminating four old Incoterms and adding two new ones. The 2000 edition used the following terms: Delivered At Frontier ("DAF"), Delivered Ex Ship ("DES"), Delivered Ex Quay ("DEQ") and Delivered Duty Unpaid ("DDU"). In the 2010 edition, these four terms have been replaced by: Delivered at Terminal ("DAT") and Delivered at Place ("DAP"). This reduction helps clarify and simplify the terms of delivery. In accordance with the former Delivery Ex Quay rule, DAT defines "delivery" to mean the goods are at the

41. *Id.* at 7.
42. *Id.*
43. *Id.*
44. *Id.*; *see also id.* at 715.

buyer's disposal once unloaded from the arriving means of transport.[45] DAP follows the former DAF, DES, and DDU rules and defines "delivery" such that "the goods are at the buyer's disposal 'on the arriving means of transport ready for unloading . . . at the named place of destination.'"[46]

4. *Guidance Notes*

The ICC also added guidance notes in the latest edition to help practitioners and traders understand Incoterm rules. In particular, the notes are designed to assist practitioners in understanding the essence of each Incoterm rule, such as when a rule should be applied, when risk passes, and how costs are allocated between the seller and the buyer.

5. *Electronic Communications*

Under Incoterms 2010, electronic means of communications are given the same effect as paper communication. Articles A1/B1 specifically state that any document referred to in A1 to A10 [or B1 to B10] may be an equivalent electronic record or procedure if agreed to between the parties or customary.[47] The ICC adopted these provisions because it recognized that parties are increasingly moving towards replacing paper communications with electronic communications, and it anticipated that this trend would increase during the next decade before the Incoterms undergo another revision.

6. *Carriage and Insurance Information*

Incoterms 2010 also more conspicuously place information duties on the seller and the buyer relating to contracts of carriage and insurance in articles A3/B3. (These provisions were moved from the generic articles A10/B10 of Incoterms 2000 into current articles A3/B3). Information relating to carriage and insurance is important so that both parties are put on notice of the responsibilities of each party. Furthermore, Incoterms CIP and CIF take into account the Institute Cargo Clauses, by placing an obligation on the seller to obtain cargo insurance at seller's expense by complying with minimum coverage under Clause C of the Institute Cargo Clause and additional coverage at buyer's expense under Clause A or B of the Institute Cargo Clause when required by the buyer.

7. *Security-Related Clearances*

Due to heightened security concerns with respect to the movement of goods, the ICC added new security-related rules. Security-related clearances implemented by Incoterms 2010 allocate obligations between the buyer and seller which require verification that the goods do not pose a threat to life or property for reasons other than their inherent nature. The purpose of this rule is to permit security checks on goods shipped domestically and internationally. Among the specific security-related clearances in Incoterms 2010 are chain-of-custody information, included in articles A2/B2 and A10/B10 of various Incoterms rules.

45. *Id.* at 54.
46. *Id.* at 62.
47. *Id.* at 8.

8. *Handling Charges*

Incoterms 2010 clarify the arrangement of allocating handling and carriage costs under CPT, CIP, CFR, CIF, DAT, DAP, and DDP. Typically, the seller must make arrangements for the carriage of the goods to the agreed destination, and the freight costs are normally included in the total selling price. The carriage cost can typically include the cost of handling the goods within the port or terminal, and the carrier or terminal operator may charge its costs to the buyer for these services. Hence, the buyer will want to avoid being double charged by both the seller in the total selling price and by the carrier or terminal operator in the carrier cost. The Incoterms 2010 rules clarify this arrangement by specifically allocating costs in articles A6/B6 of the Incoterms CPT, CIP, CFR, CIF, DAT, DAP, and DDP.[48]

9. *String Sales*

Incoterms FAS, FOB, CFR, and CIF include the obligation to "procure" goods shipped as an alternative to the obligation to "ship" goods for what are commonly referred to as "string sales."[49] String sales are defined as multiple sales down a chain and are common in commodity trades as opposed to the sale of manufactured goods. In string sales, a seller in the middle of the string "procures" the goods, rather than "ships" the goods, because the goods have already been shipped by the first seller in the string.[50] Incoterms 2010 incorporate this language in order to clarify the difference between these two scenarios.

B. Failure of Amended Article 2, Uniform Commercial Code

In 2003, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), following approval by the American Law Institute, proposed amendments to the Uniform Commercial Code ("UCC") article on Sales, Article 2. The proposed amendments, among other things, would have eliminated the definitions of shipping terms contained in former sections 2-319 through 2-324. This proposal was justified on the ground that the Article 2 definitions had become "inconsistent with modern commercial practices,"[51] which rely on the parties either to explicitly set their own private contract rules on significant shipping related issues (*e.g.*, risk of loss, delivery location, insurance, carrier, and expenses) or rely on standard definitions used in trade such as those contained in the Incoterms.

The proposed elimination of shipping terms in Amended Article 2 would have been consistent with the approach to this issue taken by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"),[52] which does not define or prescribe shipping terms.[53] While the logic behind the elimination of the shipping terms in

48. *Id.* at 36-37, 48-49, 56-57, 64-65, 72-73, 100-01, 112-13.

49. *Id.* at 79, 87, 95, 105.

50. *Id.*

51. Legislative Note to Amended U.C.C. art. 2, §§ 2-319-24 (repealed).

52. United Nations Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, 19 I.L.M. 668.

53. *See, e.g.*, United Nations Convention on Contracts for the International Sale of Goods ("CISG"), art. 32(2) ("If the seller is bound to arrange for carriage of the goods, he must make such contracts as are neces-

Amended Article 2 was compelling, seven years later, not a single state has adopted Amended Article 2.[54] It appears that the 2003 amendments will never achieve widespread acceptance for reasons that have little or nothing to do with the proposed elimination of former sections 2-319 through 2-324.[55]

Nonetheless, with the recent implementation of Incoterms 2010, it would seem to be a good time for contracting parties in the United States to review their standard practices with regard to shipping terms. Article 2 definitions of shipping terms are in some ways inconsistent with the Incoterms definitions and may not comport with the parties' expectations, yet contracting parties in the United States have often displayed a distressing tendency to incorporate Article 2 by reference without careful consideration of the implications of doing so.

Attorneys in the United States who are engaged in drafting contracts for the sale of goods would do well to abandon their almost automatic reliance on Article 2 of the UCC in favor of either Incoterms or non-Incoterms language that clearly describes the preferred position of the drafter with respect to shipment of goods and allocation of the risk of loss. The modification of Incoterms to include domestic sale contracts gives parties to sale contracts within the United States a standardized and convenient alternative to reliance on Article 2 shipping term definitions. It is hoped that contracting parties in jurisdictions such as the United States will increase their reliance on Incoterms, as opposed to the default rules contained in the unamended version of Article 2 of the UCC that remains in effect in all fifty states.

## III. U.N. Convention on Contracts for the International Sale of Goods ("CISG")

On July 8, 2010, the Dominican Republic and Turkey became the 75th and 76th countries to accede to the CISG.[56] Originally ratified by eleven countries in 1988, the twenty-first century has seen several states sign on, from every geographic region and from various stages of economic development. Most of these newcomers are developing countries in the southern hemisphere and the post-communist countries of Eastern Europe.[57]

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sary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation." (emphasis added)).

54. As of late 2010, NCCUSL's website indicates that Amended Article 2 is still under legislative consideration only in Oklahoma. *A Few Facts About The Amendments to UCC Articles 2 and 2A*, NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc22A03.asp (last visited Feb. 1, 2011).

55. For discussion of the reasons why Amended Article 2 failed to gain acceptance, *see* William H. Henning, Amended Article 2: What Went Wrong?, 11 DUQ. BUS. L.J. 131 (2009).

56. *See Status: 1980 United Nations Convention on Contracts for the International Sale of Goods*, U.N. COMM'N ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (site last visited on Feb. 1, 2011). The CISG will enter into force on July 1, 2011 for the Dominican Republic, and on August 1, 2011 for Turkey. The accession makes the Dominican Republic the second country in the Caribbean region to adopt the CISG, after Saint Vincent and the Grenadines, which adopted the treaty effective October 1, 2001. *See* CISG, arts. 98-99.

57. *See* Camilla Baasch Andersen, *Reasonable Time in Article 39 (1) of the CISG–Is Article 39(1) Truly a Uniform Provision?*, (Pace University Law Sch., Working Paper, 1998), *available at* http://cisgw3.law.pace.edu/cisg/biblio/andersen.html ("The success of the CISG is not surprising. Preceded by the less successful 1964 ULIS, and ULF, the drafting of the CISG was conducted explicitly on the basis of forming more widely

The CISG contemplates that uniform rules governing contracts for the international sale of goods should take into account the differences among social, economic, and legal systems. Created to foster the development of international trade on the basis of equality and mutual benefit as an important element in promoting friendly relations among nations, the CISG aims to promote international trade by removing legal barriers in international trade and to unify international sales law.[58] In this vein, the CISG provides uniform rules that govern certain aspects of the making and performance of everyday commercial contracts for the sale of goods.

The genesis of the CISG lies in the two 1964 Hague Conventions sponsored by the International Institute for the Unification of Private Law (UNIDROIT). The UNIDROIT rules carried little or no weight outside of Western Europe because the rules were viewed as too Eurocentric and irrelevant to legal cultures outside Western Europe.[59] The CISG emerged from the efforts of the United Nations Commission on International Trade Law ("UNCITRAL"), in light of the limited acceptance of the Hague Conventions, to remedy the perceived wrongs of Eurocentricity and the archaic rules of the *lex mercatoria*.

The CISG is divided into four main parts. Part I defines the Conventions' sphere of application and contains provisions as to interpretations, usages and requirements of contractual form.[60] Part II deals with the formation of the contract.[61] Part III contains the main body of rules on sale of goods,[62] and Part IV provides the public international framework.[63] The signal mandate of the CISG is contained in its precepts of uniformity guided by the civil law tradition of good faith in the formation of contracts.

To this end, Article 7(1) of the Convention provides: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[64] A large part of CISG jurisprudence pivots around Article 7 because of its goal of "erasing disparities in international trade." In the context of developing countries, like those of the Caribbean, the underpinnings of Article 7 illustrate that the relics of "received legal structures" will be subsumed to allow for uniformity and good faith in the interpretation of

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acceptable conventions . . . This combined with the ever-growing need to regulate international trade uniformly as the borders of the world become a little less discernible and international trade grows in volume, has made the Convention extremely popular.").

58. Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105 (1997).

59. *See* Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 468-69 (1989) ("The so-called "North-South" debate was characterized by (a) the economic fact that developing countries mainly export raw materials and agricultural products and import technology and finished goods, (b) the underdeveloped technological condition of their markets; and (c) their frequently justified mistrust of developed industrial states.").

60. CISG, arts. 1-13.

61. *Id.* arts. 14-24.

62. *Id.* arts. 25-88.

63. *Id.* arts. 89-101.

64. *Id.* art. 7 ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

contract principles. Several cases provide testimony that the mandates of Article 7 have taken on a life of their own in the adjudication of the CISG.[65]

Accession to the CISG by the island nations of Saint Vincent and the Grenadines and the Dominican Republic has potential implications for trade in the region as a whole. The threshold question is to what extent other nations in the region will follow suit.

This question is important because of the push to reform and unify the legal systems of the members of the British Commonwealth in the Caribbean. Against this backdrop, it is curious that the other nations of the Commonwealth have largely ignored the incorporation of the CISG in their discourse on legal reforms. Nevertheless, ratification by these two countries–one (Saint Vincent and the Grenadines) a common law jurisdiction, the other (Dominican Republic) a country in the civil law tradition–demonstrates that at the very least, a hybrid system of domestic and global legal rules on trade is possible, and should be desirable to the Commonwealth Caribbean nations if legal reform is to have a chance at success.[66]

Undoubtedly, the idea of a uniform law for developing countries is critical to their economic success given the realities of globalization.[67] The adoption of a uniform sales law like the CISG might help to heal the wounds of post-colonial countries, and to facilitate the growth of the economies of the developing South.[68] What is most desirable is that the CISG does not presume to champion one legal tradition in favor of another. In fact, the CISG seeks to erase any distinctions between the civil and commercial character of the parties.[69]

The adoption of international treaties like the CISG can operate within the confines of Caribbean legal traditions in a practical way to move the former colonized nations toward legal uniformity and equity in the area of international trade.

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65. *See Case Law on UNCITRAL Texts (CLOUT)*, U.N. COMM'N ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/case_law.html (last visited Feb. 1, 2011). *See also* Vivian Curran, *The Interpretive Challenge to Uniformity*, 15 J. L. & COM. 175 (1995) (book review) (Judges in the civil law countries may come to approximate their common law counterparts in increasing their reliance on precedent as a source of binding authority due to the widespread availability of the decisions of common law courts applying the CISG, while judges in common law jurisdictions may come to approximate their civil law counterparts in seeking elucidation of relevant legal principles in scholarly writing on the CISG.).

66. *See generally* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 18 (Harry M. Flechtner ed., 4th ed. 2009) (acknowledging that international legislative machinery is difficult to put into motion where most domestic laws have endured for over a century and recommending that the CISG, which "provides for flexibility," be "read and applied in a manner that permits it to grow and adapt to novel circumstances and changing times.").

67. *See* Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 583-84, n.37 (1988) (quoting sources from the debates on the proposed CISG that the "removal of . . . legal obstacles" to international trade was of "special importance to the developing countries, whose economies depended largely on foreign trade").

68. *See, e.g.*, Harry M. Flechtner, *The Several Texts of the CISG in Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J. L. & COM. 187 (1998). *See also* Azzouni Ahmad, *The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom* (Pace University Law Sch. Working Paper, 2002), *available at* http://www.law.pace.edu/cisg/biblio/azzouni.html ("[C]ritics have complained that the CISG is not well formulated and many norms remain ambiguous and this will not produce uniformity because it will be subject to different national interpretations.").

69. CISG, art. 1(3).

## IV. Sweden: Notice of Termination of Distributorship Agreements

In a decision rendered on November 3, 2009, the Swedish Supreme Court held that there is a general obligation for both parties in a contractual distributorship relationship to provide the other party with reasonable notice in the event of a termination of the contract.[70]

Although commercial agents and commission agents in Europe are subject to widespread legislation, some of it based on EU legislation, "true" distributors are not equally regulated (the one obvious exception to this general rule being Belgium).[71] As with most countries in Western Europe, Sweden lacks specific legislation dealing with distributors. One of the main reasons for this is that trade associations representing suppliers and distributors agreed on a set of standard terms for exclusive distributors in 1984 which, it was generally believed, would become standard practice in the trade.[72] As the general terms contained many provisions similar to the Commercial Agency Act,[73] which in its turn was a result of European law,[74] it was felt that there was no need for specific legislation. It was reasoned that the similarities between the general terms and the Commercial Agency Act made analogous application of the provisions of the latter especially appropriate with respect to distributorship agreements.[75] But, this was left to the courts to decide.

Case law regarding distributorship agreements remained relatively scarce. In 1989, the Swedish Supreme Court ruled in a case involving a contractual relationship which was deemed to be "more far reaching than an ordinary supply agreement."[76] In the absence of an agreement between the parties, the court found that there had been no obligation on the supplier to provide notice to the buyer/distributor before terminating the contract between the parties. The supplier was entitled to terminate the agreement with immediate effect.

Then came the case of the arctic bread distributor. In the small community of Gällivare, situated some 100 kilometers north of the Arctic Circle in Sweden, two companies in the bakery business, Malmberg AB and Allbröd Lapland AB, entered into an agreement regarding the distribution and marketing of Malmberg's products. The agreement, which was never reduced to writing, also contained obligations on marketing and certain product development. The distributor, Allbröd, bought the products from the supplier, Malmberg, and sold them in its own name, taking the full financial risk. Although the distributor was the supplier's only source of distribution in the area, it also marketed other brands of bakery products. It was a classic example of a "true" distributorship agreement.

70. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2009-11-03 p. 672 T203-08 (Swed.), *available at* http://www.hogstadomstol.se/Domstolar/hogstadomstolen/Avgoranden/2009/2009-11-03_T_203-08_dom.pdf [hereinafter NJA].

71. *See* Loi relative à la résiliation unilateral des concessions de vente exclusive à durée indéterminée [Law on the unilateral termination of exclusive distribution agreements of indefinite duration] July 27, 1961 (Belg.), *available at* http://suisse.juridat.be/cgi_loi/loi_F.pl?cn=1961072703.

72. Standard Agreement for Exclusive Distributorship,EÅ84, later replaced by EÅ04. *See* Gärde Wesslau Advokatbyra, Mandatory Notice Period for Termination of a Distributorship, http://www.internationallaw office.com/Newsletters/detail.aspx?g=5c195cf0-9543-4ae4-a178-f4e2d26b7eea&redir=1 (last visited Mar. 30, 2011).

73. LAG OM HANDELSAGENTUR (Svensk författningssamling [SFS] 1991:351).

74. Council Directive 86/553/EEC, 1986 O.J. (L***) xxx (EC) [hereinafter Commercial Agents Directive].

75. Statens Offentliga Utredningar [SOU] 1984:85 at 186.

76. NJA 1989 A 7.

Some seven years passed when, in 2004 and for reasons irrelevant to the question now at hand, the supplier decided to terminate the agreement with immediate effect. A dispute arose between the two parties, where the supplier claimed payment for goods delivered prior to the termination while the distributor on the other hand claimed damages due to the absence of any period of notice in terminating the distribution agreement.

The district court came to the conclusion that the distributor had failed to prove that there had been any agreement on a period of notice for termination between the parties. The court dismissed the possibility that a general obligation of loyalty between two contracting parties could constitute a basis for an implied period of notice. The district court also ruled out the use by analogy of legislation applicable to, *inter alia*, commercial agents or commission agents. Consequently, the district court held, the supplier had committed no breach of contract for terminating without notice.

The appellate court, however, overturned the district court's decision and found that the supplier was obliged to give the distributor a reasonable period of notice, in this case corresponding to three months.[77] After about two years in the appellate process, the case was heard by the Swedish Supreme Court in 2009.

In its November 3, 2009 decision, the Supreme Court began by finding that the relationship between the parties must be characterized as a distributorship agreement and that there is no Swedish legislation which directly governs such agreements. Like the court of first instance and the intermediate appellate court, the Supreme Court also found that it had not been established by the evidence in the case that there had been any agreement between the parties regarding notice of termination. The question then remained whether, under Swedish law, there is a general obligation to give notice under a distributorship contract.

The high court sought guidance from legislation applicable to comparable contract relationships as well as from case law. But the Supreme Court also expressly took into consideration the fact that distributorship contracts often are of an international nature. Drawing on sources as diverse as section 2-309 of the Uniform Commercial Code, European national legislation, and the Draft Common Frame of Reference ("DCFR"),[78] the Supreme Court held that, in the absence of an agreement between the parties to the contrary, a party to a distributorship agreement who wished to terminate the contract had an obligation to give reasonable notice to the other party. This obligation applies regardless of whether it is the supplier or the distributor who is the terminating party.

What then constitutes a "reasonable period of notice?" The Supreme Court set down four principal, but not exhaustive, considerations drawn from the DCFR: (i) the intended term of the contractual relationship; (ii) investments made by the other party, to the extent that such investments were reasonable given the contractual relationship; (iii) the time it takes for the other party to find an alternative commercial solution to the situation; and (iv) trade custom.[79] But, unlike the DCFR,[80] the Supreme Court rejected the notion of a minimum period of notice in favor of a case-by-case inquiry.

77. NJA 2009-11-03 at p. 672.

78. The DCFR is a set of model rules drafted by two working groups consisting of academics representing all the member states of the EU, the Study Group on a European Civil Code, and the Research Group on EC Private Law (Acquis Group). *See* LAW-NET.EU, http://www.law-net.eu (site last visited Feb. 1, 2011).

79. NJA 2009-11-03 at pp. 672, 693-94.

The Supreme Court's analysis of the importance of territorial exclusivity of the distributor is notable: the Court observed that in the case of a termination by the supplier, it is less important that a distributor had exclusivity to sell the products in a specific territory than that the distributor was prevented from selling products other than those of the supplier. The absence of an agreed right to compensation for goodwill created by the distributor during the contract term might also result in a longer period of notice being deemed reasonable.

Ultimately, the Supreme Court found that a notice period of three months would have been reasonable in this particular case.[81] This aspect of the Court's ruling was indeed case-specific, and it would be unwise to conclude that a three-month notice period in a long-term distributorship agreement may now be considered the norm. The Swedish Supreme Court seems to be taking international contract law into greater consideration when applying Swedish law, even when, as in this case, the contract was between two Swedish companies and concerned products distributed in Sweden.

80. The DCFR presumes notice reasonable with respect to non-fixed term contracts of commercial agency, franchising, and retailing if at least one month's notice is given for each year the contract was in force, up to a maximum of 36 months. *See* DCFR IV.E.-2:302: Contract for an indefinite period; NJA 2009-11-03 at pp. 672, 694.

81. NJA 2009-11-03 at pp. 672, 694.